In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

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No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

VS.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPELLANTS' REPLY BRIEF

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY
GENERAL OF IDAHO
4060 212th Way S.E.
Issaquah, Washington 98027
Telephone: (206) 392-3439
Counsel for Appellants

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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APPELLANTS' REPLY BRIEF

ARGUMENT

I

THE FICTION OF EX PARTE YOUNG MUST BE RECOGNIZED AS MERELY A FICTION, AND NOT EXPANDED TO ACCOMPLISH THE MISCHIEF URGED BY APPELLEE AND THE COURTS BELOW

Careful analysis of use of the *Ex parte Young*, 209 U.S. 123 (1908), "stripping" doctrine by the courts below and

as urged by appellee Great Western United Corporation (hereinafter "Great Western" or "GWU"), reveals that, on the one hand the appellant Idaho officials are to be treated as "private litigants"[1] or "as an individual defendant and nothing more,"[2] for purposes of federal court jurisdiction over their persons, yet they are deemed to satisfy the "doing business" requirement of the Texas long arm statute[3] because, as the circuit court of appeals stated:

> *Idaho's* "business" is to regulate. *It* was conducting that business in Texas. [Emphasis supplied.][4]

The appellant Idaho officials suggest that in the *Ex parte Young* context the appellee cannot "have its cake, and eat it, too." If, as GWU urges, the Idaho officials are for all purposes to be treated as private individual litigants, then under what guise may the challenged Idaho statutes be declared unconstitutional. For it is only through the *official* state action by the Idaho officials that the challenged state law is brought in issue. Private individuals could not act to enforce such laws.

Appellants suggest that this Court reaffirm the proper limited role of *Ex parte Young* in cases such as this. On the one hand, a state official defendant is not clothed with sovereign immunity under the Eleventh Amendment because he may be acting unconstitutionally, and *Ex parte*

[1]Brief for the Appellee at 41.

[2]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1265 (1978); (J.S. App. A-12).

[3]Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964).

[4]577 F.2d at 1268 (J.S. App. A-18).

Young, "strips" him of state immunity for federal court jurisdictional purposes, but on the other hand, his action is state action under the Fourteenth Amendment. In the *Young* context, therefore, there is a constant understanding that the state official—"stripped" for the purpose of bringing him before the court—is at all times acting in his public capacity and conducting "state action." This limited dichotomy should not be expanded, and should be emphasized by this court.

II

SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934 IS NOT APPLICABLE TO THE TYPE OF ACTIVITY WHICH OCCURRED IN THIS CASE

A. Subject Matter Jurisdiction is Lacking over the Activity Complained of.

The underlying rationale behind the Securities Exchange Act of 1934 is a congressional intent to eliminate "sharp practices" and fraudulent schemes involving securities.[5] Nowhere in the Act or in the decisions relating thereto is there any intimation that an effect of the Act would or could be to enjoin actions of state officials who are, like federal officials, regulators of securities activities rather than persons engaged in securities transactions which are subject to proscriptions and regulation of the Act.

[5]*See, e.g.* Hooper v. Mountain States Securities Corp., 282 F.2d 195, 205 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); Errion v. Connell, 236 F.2d 447, 454 (9th Cir. 1956); Goodman v. H. Hentz & Co., 265 F.Supp. 440, 446 (N.D. Ill. 1967).

In discussing the scope of authority under section 28(a) of the Securities Exchange Act of 1934 for nonconflicting state laws, a federal court in New York has made the following salient observations:

> The fiduciary responsibilities of corporate directors are in the first instance defined by the law of the state of incorporation. Federal securities legislation supersedes state corporate law remedies only to the extent of any direct conflict between the two, § 28(a), Securities Exchange Act, 15 U.S.C.A. § 78bb(a); [other citations omitted], and unless a matter is covered exclusively by federal statute, it is deemed to be subject to state law. If Congress had intended to preempt the entire field, "so revolutionary a federal intervention", Loss says "would presumably have been clearly expressed", II Loss, Securities Regulation 903. Thus, Although federal securities laws have been construed broadly in the light of their remedial purposes. [citations omitted], they remain "incomplete and interstitial" in nature [citation omitted], and do not represent a federal corporate law with respect to responsibility of officers and directors that has supremacy over state law, which Congress has never adopted.[6]

This concept of interrelationship between federal and state regulation in the securities field obtains as well for consideration of the status of the Williams Act and its engraftment into the underlying Securities Exchange Act of 1934.

Appellee GWU, supported by the courts below, contends that the enactment and enforcement of state law which al-

[6]Kaminsky v. Abrams, 281 F.Supp. 501, 504-05 (S.D. N.Y. 1968).

legedly is in "conflict" with federal law for section 28(a) purposes rises to the dignity of a civil "violation" of the 1934 Act for section 27 jurisdiction and venue purposes. Not a single case supports this bizarre rationale, and, in fact, basic rules of statutory interpretation preclude such a result, for as yet another federal court has noted:

> However, "The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of the interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect. * * *" Restatement, Torts, Vol. 2, Sec. 286. This rule is more than merely a canon of statutory interpretation. The disregard of the command of a statute is a wrongful act and a tort.[7]

Nowhere in the Securities Exchange Act of 1934 is there language which makes enforcement of a state law regulating corporate takeovers a prohibited act, nor is there a required act therein that the appellant Idaho officials have failed to perform, nor is there any "command of a statute" which these officials have failed to heed. There is simply nothing in the Securities Exchange Act of 1934 which the Idaho officials can realistically be said to have "violated" for section 27 jurisdiction and venue purposes. The cases cited by GWU for the proposition that a civil "violation" of the 1934 Act confers federal court jurisdiction under

[7]Kardon v. National Gypsum Co., 69 F.Supp. 512, 513 (E.D. Pa. 1946).

section 27 all involve situations where specific mandates and proscriptions of the Act have been breached.[8]

B. Personal Jurisdiction Was Wrongly Asserted Over the Idaho Officials.

Appellee GWU notes that several federal courts contend that due process considerations are not germane to the assertion of personal jurisdiction under federal law and federal service of process rules (Brief for the Appellee at 49-51) inasmuch as "minimum contacts" analysis has no place in consideration of nationwide, but not extraterritorial, jurisdiction. With such a contention the appellant Idaho officials disagree, since it confuses the notion of nationwide service of process with fundamental fairness principles which inhere in Fifth Amendment due process considerations. If minimum contacts analysis and fundamental fairness due process principles do not obtain in actions brought under federal jurisdictional statutes such as section 27 of the Securities Exchange Act of 1934, then only the venue provisions of such a statute (or other applicable federal venue statute) would prevent blatant forum shopping. While it may be a pleasant thought to some to envision the United States as a single federal monolith with federal courts in the various federal districts entitled to exercise nationwide reach in personal jurisdiction issues,

[8]Gratz v. Claughton, 187 F.2d 46 (2d Cir. 1951) [violation of § 16(b)]; Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974) [violation of § 16(b)]; Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979) [violation of § 10(b) and SEC Rule 10b-5]; Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D. Pa. 1946) [violation of § 10(b) and Rule X-10B-5]; Grossman v. Young, 70 F.Supp. 970 (S.D. N.Y. 1947) [violation of § 16(b)]; Kramer v. Scientific Control Corp., 365 F.Supp. 780 (E.D. Pa. 1973) [§ 10(b) and SEC Rule 10b-5].

the ability to execute nationwide service of process does not excuse federal courts from remembering that they sit in judicial districts which are formed by state boundaries in a nation of *united states* which exist side-by-side with the federal government in a context of cooperative federalism. Due process remains the rule, and cases such as *International Shoe*,[9] *Hanson v. Denckla*,[10] and the like, provide meaningful considerations by which even federal courts applying federal law should abide.

C. Venue Over the Idaho Officials Lay Solely in the District of Idaho, Not the Northern District of Texas.

Just as section 27 of the Securities Exchange Act of 1934 provides venue for civil or criminal actions constituting "violations" of the Act in any district where the act or transaction constituting the violation occurred "or in the district wherein the defendant is found or is an inhabitant or transacts business, so, too, does section 12 of the Clayton Act provide that venue is proper "not only in the judicial district whereof it [the defendant corporation] is an inhabitant, but also in any district wherein it may be found or transacts business." 15 U.S.C. § 22 (1970). Since the operative language of the two venue statutes is most similar, resort to this Court's decisions under Clayton Act section 12 provides insight into the concept of transacting business. As a circuit court noted:

> The starting point for analysis of the "transacting business" portion of Section 12 is *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, (parallel cites omitted) (1927). There the Court established the

[9]326 U.S. 310 (1945).
[10]357 U.S. 235 (1958).

major premise of the jurisprudence under Section 12, i.e. that the "transacting business" test was added to Section 12 in order to relieve

> the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—often an insuperable obstacle—enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found'.

273 U.S. at 373, (parallel cite omitted). * * *

The Court later summarized the effect of the *Eastman Kodak* case on the law of anti-trust venue. "The practical every-day business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." [Citation omitted.][11] For the purpose of inquiry herein, however, it is clear that in the context sanctioned by this Court, the appellant Idaho officials at no time "transacted business" in the Northern District of Texas so that venue might be laid there under that pretext. Though the "doing business" concept for section 27 venue purposes has not been relied upon as heavily by appellee as has section 27 venue on the basis of "any act or transaction constituting the violation," the commercial activity emphasis is worthy of note not only for section 27 venue purposes but also as that concept underlies assertion of personal jurisdiction through the Texas long arm statute, which will be discussed below.

[11]A. L. Black v. Acme Markets, Inc., 564 F.2d 681, 686 (5th Cir. 1977). (*Quoting from* United States v. Scophony Corp., 333 U.S. 795, 807 (1948).)

Simply stated, GWU contends and the courts below assert that the conduct of an Idaho official in Idaho "occurred" where it had an effect. The irony of such anaysis is that the section 27 phrase "in the district wherein any act or transaction constituting the violation occurred" implies that there can only be a single district in which venue is proper. Thus, a holding that venue is proper in the Northern District of Texas forecloses venue being laid in the District of Idaho. The operative language does not allow venue in a district where an act or transaction *in furtherance* of the violation occurred, but only in the district where an act or transaction *constituting the violation* occurred. Thus, appellants submit, the cases of *Jacobs v. Hanson* and *S-G Securities, Inc. v. Fuqua Investment Co.*[12] cited by GWU (and cases cited therein) unjustifiably expand the plain, restrictive language of section 27 itself.

Curiously, GWU quotes (Brief for the Appellee at 65) from the case of *A.L. Black v. Acme Markets, Inc.*[13] in support of its section 27 venue assertions. The case is wholly inapposite to the case at bar inasmuch as it relates to antitrust and tort claims wherein venue is based solely on "transacting business" and "commercial contact" with the forum, both under section 12 of the Clayton Act and under the Texas long arm statute.

Throughout the conduct of this action, appellee and the authorities cited by appellee have maintained that the concepts of personal jurisdiction (and in the section 27

[12][CURRENT] CCH FED. SEC L. REP. ¶ 96,770 (D. Del. Feb. 6, 1979 and [CURRENT] CCH FED. SEC. L. REP. ¶ 96,750 (D. Mass. Dec. 19, 1978). *Cited in* Brief for the Appellee at 64-65.

[13]564 F.2d 681 (5th Cir. 1977).

context, subject matter jurisdiction) and venue may be addressed virtually identically. The admonishment of the Second Circuit in *United States ex rel. Rudick v. Laird*,[14] seems appropriate:

> Because appellee seems to confuse the principles of jurisdiction with those of venue, at the outset it is necessary to restate the difference between the two. The concepts of personal jurisdiction and venue are closely related but nonetheless distinct. Jurisdiction is the authority to hear and determine a cause; it is, in essence, the power to adjudicate the action. If a court lacks jurisdiction over an action, it lacks the power to act with respect to that action. Venue, on the other hand, does not involve the power of authority to adjudicate a controversy. It relates solely to the place where jurisdiction should or may be exercised. Venue is a forum limitation imposed for the convenience of the parties. As a concept of convenience rather than of jurisdiction, it may be conferred on a court either by consent or by the failure of the defendant to make a timely objection. In either case, whether it is conferred by consent or waiver, the court may render a valid judgment, whereas lack of jurisdiction cannot be waived, and a court without jurisdiction is without power to render a valid or binding judgment. Thus venue deals with the question of which court, or courts, of those which possess adequate personal and subject matter jurisdiction, may hear the specific matter in question. In short, jurisdiction must first be found over the subject matter and the persons involved in the cause before the question of venue can be properly reached. [Citations omitted.][15]

[14]412 F.2d 16 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969).
[15]412 F.2d at 20.

Appellant Idaho officials submit that section 27 is a wholly inappropriate vehicle for use in this instant action, not only because it is not properly applied to state official regulators of securities transactions who are not themselves subject, as regulators, to the duties and proscriptions of the Securities Exchange Act of 1934 generally, but also because no duty or proscription of that Act has been breached, due process standards have not fairly been applied, and venue concepts have been misconstrued and misapplied.

III

THE TEXAS LONG ARM STATUTE DOES NOT REACH IDAHO OFFICIALS ACTING IN A NON-COMMERCIAL MANNER IN ENFORCING IDAHO LAW

Though the Texas long arm statute[16] is interpreted to reach to the furthest limits of constitutional due process, such due process considerations are germane *only* when the threshold requirement of activity within the purview of the statute has been met. Without engaging in a discussion of what the Texas legislature *might* have done in passing a long arm statute, it is clear from the text of the existing Texas law that its scope is limited by the concept of "engag[ing] in business" in Texas.[17] For purposes of the statute, the Texas legislature has specifically declared that two activities:

> (1) entering into a contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State; or

[16]Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964).
[17]art. 2031b, § 3.

(2) the committing of any tort in whole or in part in this State

are "deemed doing business in this State."[18] The specifically defined activities constituting "doing business" are not exclusive, and "other acts that may constitute doing business" may also subject a person or company to Texas long arm jurisdiction.[19]

Though appellee urges that technical and abstruse attempts to consistently define "doing business" need not be engaged in (Brief for the Appellee at 56), there remains no way to obscure the fact that "doing business" is a condition precedent for long arm statute application. As Professor Thode notes: " 'Doing business' is still the test for state regulation, but the limits on jurisdiction for the purpose of suing a nonresident are greatly enlarged."[20] Though appellee quotes from the recent Texas Supreme Court decision in *U-Anchor Advertising, Inc. v. Burt*[21] to the effect that focus on due process concepts is more desirable than attempts to grapple with "doing business" definitions (Brief for the Appellee at 56), it is clear from a previous statement in that case that "doing business" requirements of Texas law were satisfied:

> The contract in question obligated Burt to perform his payment obligations at the office of U-Anchor in Amarillo, Texas, and thus he was "doing business" in Texas within the meaning of the statute. We agree

[18]art. 2031b, §4.

[19]*Id.*

[20]Thode, *In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 303 (1964).

[21]553 S.W.2d 760 (Tex. 1977), *cert. denied*, 98 S.Ct. 1235 (1978).

> that in this respect, as well as with respect to "other acts that may constitute doing business," Article 2031b reaches as far as the federal constitutional requirements of due process will permit.[22]

There is no plausible construction of the activities of the appellant Idaho officials which will cause the commercial overtones of the "doing business" requirement to be satisfied. Appellee urges fulfillment of the "doing business" requirement through the Fifth Circuit's statement that: "*Idaho's* 'business' is to regulate. *It* was conducting that business in Texas."[23] (Brief for the Appellee at 56.) The logic fails for several reasons. Two Idaho officials, stripped of their sovereign immunity through *Ex parte Young*, are the defendants/appellants in this action, not the State of Idaho; thus it is immaterial what the "business" of the State of Idaho is. Moreover, just as the phrase "none of your business" has no commercial overtones and in no way relates to the concept of "doing business" in its ordinarily recognized sense for long arm statute purposes, so too, is the phrase that Idaho's " 'business' is to regulate" incapable of meeting the normal "doing business" concepts—all of which imply commercial, profit-oriented activity which state official regulators acting in a governmental capacity do not engage in. (*See* discussion of this Court's understanding of the "doing business" concept for antitrust law purposes at II C above.) The other cases cited by appellee in support of its contention that the "doing business" requirements of long arm statutes may be disregarded and focus made solely on due process standards all involve situations

[22]553 S.W.2d at 762.

[23]577 F.2d at 1268; (J.S. App. A-18).

where statutory threshold requirements which brought the activity within the purview of the statute were met.[24]

Notwithstanding the fact that threshold requirements of Texas law are not met for long arm jurisdiction purposes, due process standards (already discussed at length in Brief for the Appellants at 42 to 51) are lacking.[25]

Finally, appellee leans heavily upon *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975). Though the case, apparently not appealed, is a shocking one both in terms of

[24]Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968) [Tennessee long arm statute; business activity in state with physical presence of reps. of defendant in state]; Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) [Texas long arm statute; tort in state together with continual and substantial business in state]; Black v. Acme Markets, Inc., 564 F.2d 681 (5th Cir. 1977) [Texas long arm statute; antiturst action against corp. with substantial business activity in Texas]; Southern National Bank of Houston, Tex. v. Tri-Financial Corp., 317 F.Supp. 1173 (S.D. Tex. 1970) [Texas long arm statute; contract to be performed in whole or in part in Texas, and tort committed in whole or in part in Texas]; Maricopa County v. American Petrofina, Inc., 322 F.Supp. 467 (N.D. Cal. 1971) [Arizona long arm statute; defendant "caused an event to occur in this state out of which the claim which is the subject of the complaint arose"]; Darden v. Heck's Inc., 459 F.Supp. 727 (W.D. Va. 1978) [Virginia's long arm statute; single business act within Commonwealth which resulted in tortious injury where architect made trips to construction site in Virginia]; State ex rel. Sperandio v. Clymer, 568 S.W.2d 935 (Mo. 1978) [Missouri long arm statute; commission of a tortious act within the state]. Hess v. Pawlowski, 274 U.S. 352 (1927), cited by appellee correctly upholds extraterritorial jurisdiction over a nonresident motorist who has been involved in an automobile accident in the forum state on the grounds of physical presence in the state at the time of the jurisdiction causing event. The "doing business" requirement for Texas long arm jurisdiction was not invented by the appellants; it is wholly and solely a creature of the Texas legislature, who have, in their wisdom, included that "limitation" on Texas' long arm jurisdiction ability.

[25]This case presents an excellent opportunity for this Court to demonstrate that its footnote language in *Nevada v. Hall*, 47 U.S.L.W. 4261, 4265 n. 24 (Mar. 5, 1979), has substance and that we truly continue to have a "constitutional system of cooperative federalism."

the tortious activity which formed the basis of the suit and the decision to allow jurisdiction in Wisconsin, the jurisdictional result (stripped of any questions of applicability to governmental officials generally) is distinguishable from the case at bar for several reasons. First, the officials sued were local government officials, not state officials (who are usually afforded greater legal protection than local officials). Second, the Wisconsin long arm statute specifically authorized jurisdiction for tortious acts or omissions outside the state which caused local injury with some additional contact with the State (in this case continued solicitation of the plaintiff's arrest).[26] The Wisconsin law contained no limitation based on an initial link of "doing business" in any general or specifically defined manner in whole or in part in that State, as does the relevant Texas law. Third, the defendants participated in a continued series of activity over a period of three separate arrests in which they deliberately solicited results in Wisconsin twice and New York once by appealing to various local officials to hold the plaintiff in custody. The case is wholly inapposite to the facts of this instant action.

IV

VENUE UNDER THE APPLICABLE GENERAL FEDERAL VENUE STATUTE IS IMPROPER IN THE NORTHERN DISTRICT OF TEXAS

At the outset it must be reiterated that this lawsuit resulted from the desire of appellee Great Western to conduct business in Idaho, not from some overt act of an Idaho official attempting to assert extraterritorial juris-

[26]399 F.Supp at 768.

diction over a company fortuitously based in Texas which had no business contacts with Idaho. In response to this purposeful activity by appellee the single acting Idaho official acted in Idaho to enforce Idaho law, the impact of which was felt by GWU in Texas—and everywhere else in the United States that it did business. "Historically, venue has been geared primarily to the convenience of the defendant rather than that of the plaintiff since it is the defendant who is brought into court."[27] If it is to remain true that a claim is deemed to arise only in one place for § 1391 venue purposes[28] then under the "place where the claim arose" analysis alone, Idaho could not be in the district of venue despite the fact that all relevant activity took place in that district.[29] As noted above in discussing venue under § 27 of the Securities Exchange Act of 1934, appellee and others fail to make distinction between venue and personal jurisdiction questions—an issue which has already been discussed at length in Brief for the Appellants at 62 to 65.

Appellants note that in defending a lengthy and complex action in federal court in the District of Idaho brought by Sunshine Mining Company under the Williams Act, GWU did not challenge the fact that venue was laid in Idaho. Yet, if the theory advanced by GWU and the courts below is correct, the proper place for venue in that action

[27]Reuben H. Donnelley Corp. v. FTC, 580 F.2d 264, 269 (7th Cir. 1978). *See* comment on the historical development of federal venue statutes in Brief for the United States as Amicus Curiae in *Stafford v. Briggs*, No. 77-1546 at 50 to 54.

[28]15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction* § 3806 at 26-29 (1976).

[29]Of course, Idaho would be a proper district for § 1391 venue as the place where all defendants reside.

was the Northern District of Texas inasmuch as that district is where the impact of Sunshine's challenge to GWU's tender offer had its effects or consequences.[30]

V

FEDERAL LAW HAS NOT PREEMPTED STATE LAW IN THE SECURITIES REGULATION FIELD, UNDER THE WILLIAMS ACT OR OTHERWISE

Though appellants have already discussed preemption considerations in their Brief for the Appellants at 66 to 84, a few of the cases noted by GWU merit further comment. In *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1916), this Court declared:

> Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line.[31]

Thus, two factors distinguish *Winfield* as a preemption case: (1) railroads have traditionally been subjected to federal preemption doctrines in a number of areas, and (2) the traditional federal/state interrelationship which inheres in the securities field (and is formally recognized by Congressional act and decisions of this Court) does not exist with regard to railroad regulation (wherein the states may affect only limited activities). In the case of the Williams Act, unlike the Federal Employer's Liability Act at

[30]Sunshine Mining Co. v. Great Western United Corp., (1977-78 TRANSFER BINDER) CCH FED. SEC. L. REP. ¶ 96,049.

[31]244 U.S. at 149.

issue in *Winfield*, federal takeover law was engrafted into an existing federal scheme wherein federal preemption does not exist except as specifically and narrowly carved out by the literal terms of federal law. In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), federal patent law preemption of state law was found because the operative state law would have given exclusive protection of unlimited duration to an idea and product which was not worthy of patent (with exclusive rights for a fixed term of years) under federal law.[32] Thus, the state law would have acted to emasculate federal law, rather than to fill in the interstices of federal law and provide additional investor protection as do state corporate takeover laws such as Idaho's.

The fact that preemption should not be found herein is underscored by a point-by-point analysis of what an offeror would have to go through under Idaho blue sky law (the Idaho Securities Act) to make an exchange tender offer, as compared to the requirements of the Idaho Corporate Take-Over Law with regard to cash tender offers which is set forth at length in the Appendix hereto. The analysis demonstrates that compliance with the Idaho Securities Act in an exchange offer statutorily requires a greater degree of itemized disclosure of investment information than does compliance with the Idaho Corporate Take-Over Law for cash tender offers. The Idaho requirements would apply in all instances where an exchange offer is not a national coordinated offer under which the several states have agreed to accept a copy of the SEC registration for compliance with state disclosure rules.

[32]376 U.S. at 231.

There is simply no reason why cash tender offer actions for corporate control should enjoy some "special," privileged position when *all* other modes of acquiring corporate control or changing corporate structure are subject to deliberation and state regulation.

VI

THE IDAHO CORPORATE TAKE-OVER LAW DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

The extraterritorial reach of the Idaho Corporate Take-Over Law appears to be its most controversial aspect. Yet, without such a reach the law would only apply in Idaho and would, no doubt, result in Idaho investors being ignored and left out of any national cash tender offer. GWU refers to an English case to support its contention that "Tobago [cannot] pass a law to bind the rights of the whole world",[33] yet the crux of the problem the English court had with the Tobago law was that the law utterly failed to provide the defendant with notice and an opportunity to be heard in the Tobago courts—not that Tobago substantive law was defective or not entitled to recognition.

Other cases raised by appellee on the issue of extraterritoriality are distinguishable. In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934), this Court merely held that a state could not extend the effect of its laws beyond its borders so as to destroy or impair the rights of citizens of other states to make a contract not operative within that state, and law-

[33]Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (1808). *See* discussion of this case in *Hilton v. Guyot*, 115 U.S. 113, 179 (1895), which discusses at length application of full faith and credit and comity principles to foreign law judgments.

ful where made. The court recognized the right of a state to prohibit enforcement within its borders of a contract, legal elsewhere, but violative of local state law. In the corporate takeover field, a complex situation arises. Even though a tender offeror might make a series of contracts outside the regulating state and not operative within the regulating state, the net effect of those contracts in the aggregate is to affect a corporate entity based in the regulating state wherein the investors with whom the contract is made have a fiduciary relationship with company management. Though target company management may avoid applicability of the Idaho Corporate Take-Over Law by approval of a proposed tender offer, this result is based on no other consideration than the state's belief that it has a limited interest in interfering with acts which meet corporate management approval under standards of high fiduciary responsibility. Quite the contrary is true when target company management rejects a tender offer. In such a case, the Williams Act provides no method whereby shareholders are offered more than skeletal investment information about the tender offeror, and provides no opportunity for an auction market to occur. Idaho prefers to indulge in the speculation that most corporate management is responsible management which takes its fiduciary responsibility to corporate shareholders seriously, rather than to indulge in the speculation which underlies comments about the Williams Act which almost raises a presumption that incumbent management is "entrenched" or "ineffective." Because target company management, in fulfilling a fiduciary role, has no means under federal law in providing target company shareholders with information about the

tender offeror which is more detailed and broad in scope than that provided by the Williams Act, and because this management has no means whereby it may effectively delay the consummation of a tender offer so that shareholders may reflect upon information provided by federal law or otherwise or have an opportunity to be offered more for their shares either by the initial or a competing tender offeror as a result of an auction market, states have stepped in to fill the void left by the minimal federal requirements. Of course tender offerors and arbitrageurs do not like state laws, much prefering the limited role of the Williams Act. But many states have deemed that shareholders deserve more and that tender offerors and arbitrageurs have no inherent right to snap up bargains at the expense of shareholders who tender their shares based on sketchy information of what may be the future of the company whose shares they hold. State laws provide for these investors a protection through delay and disclosure which those with a fiduciary responsibility to them cannot provide under existing law.

Unlike the situation in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), Idaho is not trying to protect the economic welfare of its citizens by guarding them against cheaper prices from outside the state, but is, instead, trying to insure that Idaho investors are treated *equally* with all other investors in the Nation—and that all investors are able to make choices based upon informed considerations and the opportunity to be offered the highest price for their shares. Although the Idaho Corporate Take-Over Law does purport to have a necessary and incidental extraterritorial reach it is not that dissimilar from the Cali-

fornia law at issue in *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935), wherein this Court noted that "the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences."[34] In the context herein, Idaho has the power to regulate certain corporate activities of a target company which meets the criteria which trigger enforcement of the Idaho Corporate Take-Over Law, as well as to protect the investors of that company. GWU takes great issue with the fact that only about 2% of Sunshine Mining Company's shareholders reside in Idaho. Yet, the exhibit disclosing the extent to which shares of Sunshine are distributed throughout the United States (A. 36) reveals that the highest total number of shares are owned by shareholders in New York (2,453 shares), despite the fact that such a figure, upon closer inspection, will merely reveal that much Sunshine stock is held by stock brokerages in "street name" for actual owners of that stock residing elsewhere. Thus, we have no "true" figures to reveal the actual number or percentage of Idaho shareholders of Sunshine. Nor is the number of Sunshine shareholders who reside in Idaho the relevant consideration, for *all* Sunshine shareholders have a beneficial relationship with Idaho through those who represent them in Idaho in a fiduciary capacity. It is beneficial for all Sunshine shareholders to have some state which may take an interest in insuring that they make informed choices when being solicited to tender all or a portion of their Sunshine stock, and that they be able to do so with the benefit of an auction market should one

[34]294 U.S. at 541.

arise. Though it is unfortunate that an auction market did not arise with regard to the GWU tender offer for Sunshine shares that fact merely is reflective of the troubled condition the company was in as the result of its earlier mine disaster and recent strike—it was simply "unattractive" to other potential offerors. Such has not been the case in other tender offers, and state laws have allowed the formation of an auction market in which shareholders ended up being offered more for their shares than the initial offeror opened the bidding with.[35] GWU also makes much of the fact that state takeover laws allow inefficient, entrenched management to perpetuate themselves in office (or at least attempt to). This contention has become a rubric in the tender offer context, yet is not borne out in fact inasmuch as most tender offers, once begun, are completed and the target company "goes somewhere."[36] In the case of Sunshine, after GWU's successful partial tender offer "entrenched" management (though disliked by many and blamed by others for the tragic mine disaster) was retained.

A final comment is reserved for *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978), wherein the Minnesota Supreme Court rightly recognized that the case before it was "a criminal case not subject to the same flexibility enjoyed by the more elastic rules covering extraterritorial jurisdiction in civil cases."[37]

The appellants fully recognize the uniqueness of this case and the extraterritorial reach of the Idaho law in

[35]*See* Brief for the Appellants at 97, n. 182 & 99, n. 183.
[36]*See* Brief for the Appellants at 94, n. 176.
[37]273 N.W.2d at 628.

question. What the appellants ask is that this Court recognize the legitimacy of the Idaho goal of investor protection and place its imprimatur on this limited type of extraterritoriality.

CONCLUSION

For the reasons discussed above and in the Brief for Appellants, the judgments by the courts below should be reversed.

Respectfully submitted,

PETER E. HEISER, JR.
SPECIAL DEPUTY ATTORNEY
GENERAL OF IDAHO
Counsel for Appellants

April 13, 1979

(Appendix Follows)

APPENDIX

APPENDIX

This is a comparison between Idaho Code Section 30-1423 —REGISTRATION BY QUALIFICATION and Idaho Code Section 30-1503—REGISTRATION OF TAKE-OVER OFFERS.

The purpose of this comparison is to determine whether or not the Idaho Corporate Take-Over Law in fact requires a more detailed presentation of investment disclosure than a filing and registration by qualification under the Idaho Securities Act.

The Idaho Securities Act at Section 30-1423 (1)(2)(3)(4)(7)(8) states:

> "Any security may be registered by qualification. A registration statement under this section shall contain the following information and be accompanied by the following documents, in addition to payment of the registration fee prescribed in section 30-1437, Idaho Code;
>
> (1) with respect to the issuer and any significant subsidiary; its name, address, form or organization, the state or foreign jurisdiction and date of its organization and the location of its business, the nature and market for any proposed products or services, and a description of its physical properties and equipment,
>
> (2) with respect to every director and officer of the issuer, or person occupying a similar status or performing similar functions; his name, address, principal occupation for the past five (5) years, the amount of securities of the issuer held by him as of a specified date within ninety (90) days of the filing of the registration statement, the remuneration paid and any direct

or indirect material interest by contract, security holdings or otherwise in the company or in any affiliated company or nearby property that may be benefited by any activities of the company,

(3) with respect to any person not named in subsection (2) of this section owning of record or beneficially, if known, ten per cent (10%) or more of the outstanding shares of any class of equity security of the issuer; the information specified in said subsection (2) other than his occupation,

(4) with respect to every promoter, not named in subsection (2) of this section, if the issuer was organized within the past three (3) years; the information specified in said subsection (2), any amount to be paid to him by the issuer within that period or intended to be paid to him, and the consideration for any such payment,

(7) the estimated cash proceeds to be received by the issuer from the offering, the purposes for which the proceeds are to be used by the issuer, the amount to be used for each purpose, the amounts of any funds to be raised from other sources to achieve the purposes stated and the sources of any such funds, if any part of the proceeds is to be used to acquire any property including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors and the purchase price,

(8) a description of any stock options or other security options outstanding or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subsections (2), (3), (4), (5) or (7) of this section and by any person who holds or will hold ten percent (10%) or more in the aggregate of any such options,"

The Idaho Corporate Take-Over Law at section 30-1503 (2)(a) states:

"REGISTRATION OF TAKE-OVER OFFERS.—(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed."

Section 30-1502(1)(a)(b)(c)(d)(e) states:

"FILING OF OWNERSHIP INFORMATION.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five percent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected,

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities which are being offered in exchange for the equity securities of the target company, and if any

part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation, or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements or understandings have been entered into."

ANALYSIS: The disclosure requirements of the Securities Act and the Take-Over Law are broad in scope. Both laws require comprehensive disclosure about the identity of persons engaged in a tender offer or persons owning, or controlling the activities of a securities issuer. Both laws

require disclosure of any contractual agreements with the securities issuer on agreements concerning the equity securities of a target company.

The Take-Over Law generally limits its disclosure requirements to the background and identity of the purchaser; the source and amount of funds used in the acquisition of the equity securities of a target company; the purpose of the acquisition; the amount and number of shares acquired and owned by the purchaser, and the nature of any agreements to acquire additional equity securities of a target company.

The Idaho Securities Act exceeds the disclosure required by the Take-Over Law by seeking disclosure concerning the issuers ownership of any affiliated company or nearby property that may be benefitted by any activities of the issuer or any promoter of the issuer if it was organized within three years of the date of the filing of a registration statement.

The Idaho Securities Act at section 30-1423 (5)(10)(11)(15) states:

"Any security may be registered by qualification. A registration statment under this section shall contain the following information and be accompanied by the following documents, in addition to payment of the registration fee prescribed in section 30-1437, Idaho Code;

(5) the capitalization and long-term debt on both a current and a pro forma basis of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, the market therefor and a statement of the

amount and kind of consideration whether in the form of cash, physical assets, services, patents, goodwill, or anything else for which the issuer or any subsidiary has issued any of its securities within the past two (2) years or is obligated to issue any of its securities,

(10) any adverse order, judgment or decree previously entered in connection with the offering by any court or the United States securities and exchange commission, a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets including any such litigation or proceeding known to be contemplated by governmental authorities,

(11) any adverse order, judgment or decree entered within the previous ten (10) years or in litigation in connection with any other offering of securities or practice involving securities against the issuer, its subsidiary or parent organizations, or persons required to be named in subsections (2), (3) or (4) of this section pursuant to this offering.

(15) a balance sheet of the issuer as of a date within four (4) months prior to the filing of the registration statement, a profit and loss statement and analysis of surplus for each of the three (3) fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence, if less than three (3) years and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant, and"

The Idaho Take-Over Law at section 30-1503(2)(c) states:

"(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period."

ANALYSIS: Both laws require disclosure of the capitalization of: the issuer, and any significant subsidiary (under the Securities Act). The offeror and its subsidiaries (under the Take-Over Law). The Take-Over Law limits its requirements to "material information." The Securities Act requires disclosure about *any transaction* in which the issuer has issued its securities or the securities of a subsidiary within two years from the date of filing a registration statement.

The Idaho Securities Act at section 30-1423(6)(12)(13) states:

"(6) the kind and amount of securities to be offered, the amount to be offered in this state, the proposed offering price and any variation therefrom at which any portion of the offering is to be made to any persons except as underwriting and selling discounts and commissions, the estimated aggregate underwriting and selling discounts, commissions and other promotional fees including separately cash, securities, or anything else of value, to accrue to the underwriters in connection with the offering, the estimated amounts of other selling expenses and legal, engineering and accounting expenses to be incurred by the issuer in connection with the offering, the name and address of every underwriter and every recipient of a promotional fee, a copy of any underwriting or selling group agreement pursuant to which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined, and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter,

(12) a copy of the prospectus or circular and any supplementary advertising script or selling literature intended as of the effective date to be used in connection with the offering. No other or additional script, sales material or literature shall be communicated to more than ten (10) persons during the offering without written or telegraphic permission of the director,

(13) a specimen or copy of the security being registered, a copy of the issuer's articles of incorporation and by-laws, as currently in effect, and a copy of

any indenture or other instrument covering the security to be registered,"

The Idaho Take-Over Law at section 30-1503(2)(b) states:

"(2)(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company."

ANALYSIS: Both laws require disclosure of the terms of the securities offering or offer to purchase. The Securities Act sets forth specific disclosure requirements concerning the terms of the offering. The Take-Over Law only requires filing three copies of the proposed take-over offer and the disclosure of all material terms of the offer.

The Idaho Securities Act and the Idaho Take-Over Law are designed to effect full and complete disclosure of investment information. The disclosure requirements of the Take-Over Law do not appear to exceed the disclosure requirements of the Idaho Securities Act. In fact, the Idaho Securities Act appears to require by statute a greater degree of itemized disclosure of investment information.